Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMELL BIRT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. WHETHER A STATE POLICE TROOPER, WHOM A DISTRICT COURT HAD PREVIOUSLY HELD HAD VIOLATED THE CIVIL RIGHTS OF OCCUPANTS OF A VEHICLE IN AN ILLEGAL TRAFFIC STOP, UNCONSTITUTIONALLY EXTENDED THE SCOPE OF PETITIONER'S ROUTINE TRAFFIC STOP WITHOUT REASONABLE SUSPICION OR PROBABLE CAUSE BASED IN PART ON A PRIOR ENCOUNTER WITH PETITIONER SUCH THAT ANY SUBSEQUENT CONSENT TO SEARCH WAS INVOLUNTARY AND INVALID?

B. WHETHER THE FOURTH AMENDMENT IS OFFENDED WHEN THE GENERALIZED CONSENT TO SEARCH A VEHICLE IS EXTENDED TO OPEN AND SEARCH A CLOSED OVERNIGHT BAG INSIDE A LOCKED TRUNK FOR WHICH NO CONSENT -- SPECIFIC OR IMPLIED -- WAS GIVEN?

PARTIES TO THIS PROCEEDING

The parties to this proceeding are: Jamell Birt, the Petitioner herein, by and through his counsel of record, William C. Costopoulos, Esquire, and the United States of America, the Respondent herein, by and though its counsel of record, William Behe, Assistant United States Attorney.

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REFERENCE TO OPINIONS BELOW

The United States Court of Appeals for the Third Circuit filed an unreported opinion in support of its judgment on January 19, 2005, which is reproduced in the Appendix beginning at page A2.

The United States District Court for the Middle District of Pennsylvania filed an unreported opinion in support of the order denying the motion to suppress evidence on March 26, 2003, which is reported in the Appendix beginning at page A9.

STATEMENT OF JURISDICTION

This petition for a writ of certiorari is from the judgment order of the United States Court of Appeals for the Third Circuit entered on January 19, 2005, which affirmed the judgment of the United States District Court for the Middle District of Pennsylvania entered on March 1, 2004.

Your Honorable Court has jurisdiction of this matter pursuant to sections 1254(1) and 1651 of Title 28, United States Code, 28 U.S.C. §§ 1254(1) and 1651.

CONSTITUTIONAL PROVISION

Fourth Amendment to the United States Constitution

"The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

This petition for writ of certiorari to the Third Circuit arises from the denial of Mr. Birt's motion to suppress evidence by the District Court, which was affirmed on direct appeal. After a routine traffic stop by a Pennsylvania State Police trooper, Mr. Birt was detained and a warrantless search of a sealed overnight bag in the locked trunk -- to which he did not consent -- revealed crack cocaine. He entered a conditional guilty plea, was sentenced and a timely direct appeal was taken.

On October 29, 2001, after the cocaine was seized, Mr. Birt was arrested. He was indicted on November 14, 2002 and charged with one count of possessing with the intent to distribute 50 or more grams of crack cocaine, 21 U.S.C. § 841(a)(1). Petitioner was represented by Thomas Thornton, assistant federal public defender.

A motion to suppress evidence was filed on January 29, 2003. A suppression hearing was held on March 19, 2003. By order and memorandum opinion filed on March 26, 2003, U.S. District Court Judge Yvette Kane denied the suppression motion. See Appendix.

Mr. Birt entered a conditional guilty plea on June 9, 2003 to an information charging him with the possession with intent to distribute an unspecified quantity of crack cocaine; the indictment was dismissed. He was sentenced to 20 years in prison consecutive to his current sentences; 3 years of supervised probation; a $1,000 fine; a $1,000 restitution; and a $100 special assessment. Petitioner timely filed a notice of appeal to the Third Circuit on March 2, 2004.

On October 29, 2001 Trooper Gregory Miller, Pennsylvania State Police, stopped the vehicle operated by the Petitioner, Jamell Birt, on Interstate 81 southbound in Union Township, Lebanon County, Pennsylvania for speeding and not using a turn signal to change lanes; he was alone. After determining that Mr. Birt's driver's license and registration card were in order, the trooper -- who had a drug dog with him -- issued him a written warning. N.T. 3-9, 26-27. Another trooper arrived at the scene. N.T. 20-21. Trooper Miller said that he observed Petitioner in his rearview mirror and considered him to be "overly nervous." "He's relaxed -- he's reclined in the seat, however, he's trying to appear that he's not nervous by reclining himself

in the seat." N.T. 31, 9. An NCIC criminal history check indicated a prior record for drugs. N.T. 11-12. However, the trooper admitted that there was no indication of illegality about the paperwork and he could see no sign of criminal activity inside the car. N.T. 27, 29.

Before actually giving Petitioner, who remained in his vehicle, the written warning, Trooper Miller had decided to ask him permission to search the vehicle. N.T. 52. The trooper re-approached Mr. Birt's car and asked him to exit because he wanted him out to try and develop probable cause to search the vehicle, "to make more observations of him." N.T. 32-33, 35. Petitioner, who felt he was required to come out of the car with two troopers and a drug dog on the scene, complied. N.T. 56.

Trooper Miller explained the written warning to Mr. Birt and he signed it. Petitioner was told he was free to go. N.T. 14, 56. According to the trooper, as they walked back to their respective vehicles, "I turned around and asked him if I could ask him a few questions." "He came back to where I was standing and just sort opened his arms to say go ahead." Mr. Birt gave no verbal response. N.T. 14. Petitioner testified:

> Somewhere between that he turns around, and he's asking me, as I'm walking, can I -- can he talk to me for a minute. I turned around. He's asking me -- he's telling me do I know that this is a high drug in the state or whatever and people was trafficking drugs, whatever, whatever, and I'm just standing there listening to him. so then he asked me do I have anything to hide? I tell him no. He asked to step to the back of my vehicle where the other officer was standing on the side of the passenger side towards the trunk. At that point he goes into my vehicle, he's searching the vehicle. He's asking me about a key to my trunk. It's only one key.

N.T. 57. Mr. Birt denied giving the trooper any consent to search the vehicle: "He asked me a question, and from there he took it in his own hands." N.T. 61. He also testified that Trooper Miller had stopped the car in which he was riding about 2 months earlier and demanded to search it even after having been refused consent, threatening to have the car towed at their expense. N.T. 60. The trooper did not deny this claim, merely testifying that he did not recognize him as a passenger in a vehicle that he had stopped. N.T. 78.

Trooper Miller "asked him questions related to his origin, destination and purpose of his trip, where he was coming from, where he was going to, how long he had been there and so forth." N.T. 15. The trooper said that after Petitioner indicated he had nothing to hide, he asked him whether he could search the vehicle and Mr. Birt replied that he could. N.T. 40. Trooper Miller did not ask him, however, whether he could search any containers inside the vehicle. N.T. 48.

Trooper Miller then proceeded to search the inside of the vehicle to make sure that it was "safe" for the drug dog. He opened the trunk from the inside and found a small overnight bag that he put on top of the trunk lid. The drug dog ran around the exterior of the vehicle and "hit" on the bag. "I opened it up, and inside the bag I found a plastic bag, and inside that plastic bag was three, three baggies, containing a brownish chunky substance that I knew from prior experience to look like crack cocaine." Petitioner was arrested. N.T. 17-19.

Finally, Trooper Miller admitted that he was the same Gregory Miller in the case of Padilla, et al. v. Gregory Miller, a Pennsylvania State Trooper, 143 F.Supp.2d 453 (M.D.Pa.1999) and 143 F.Supp.2d 479 (M.D.Pa.2001), in which the Honorable Thomas I. Vanaskie, Chief Judge of the United States District Court for the Middle District of Pennsylvania, found that Trooper Miller had violated the civil rights of a husband and wife after the driver was detained, arrested and held in custody following an illegal search of their vehicle; awarded were compensatory damages. N.T. 79.

Mr. Birt was sentenced and judgment was entered by the District Court on March 1, 2004. A notice of appeal to the Third Circuit was filed the next day. After briefing and oral argument, a three judge panel of the Third Circuit affirmed the judgment in a non-published opinion filed on January 19, 2005. See Appendix.

Petitioner now timely files this petition for a writ of certiorari with Your Honorable Court.

REASONS FOR ALLOWANCE OF WRIT

A. A STATE POLICE TROOPER, WHOM A DISTRICT COURT HAD PREVIOUSLY HELD HAD VIOLATED THE CIVIL RIGHTS OF OCCUPANTS OF A VEHICLE IN AN ILLEGAL TRAFFIC STOP, UNCONSTITUTIONALLY EXTENDED THE SCOPE OF PETITIONER'S ROUTINE TRAFFIC STOP WITHOUT REASONABLE SUSPICION OR PROBABLE CAUSE BASED IN PART ON A PRIOR ENCOUNTER WITH PETITIONER SUCH THAT ANY SUBSEQUENT CONSENT TO SEARCH WAS INVOLUNTARY AND INVALID.

Petitioner concedes that the traffic stop of his vehicle was legal, e.g., for speeding/unsafe lane change. However, the continued investigative detention by the Pennsylvania State Police beyond the stop lacked any reasonable and articulable suspicion of criminal activity and therefore violated the United States Constitution. The protections of the Fourth Amendment apply to traffic stops. See, e.g., United States v. Johnson, 63 F.3d 242, 245 (3d Cir.1995)(citing cases), cert.den., 518 U.S. 1007, 116 S.Ct. 2528, 135 L.Ed.2d 1052 (1996). This Honorable Court has held that:

> [t]emporary detention of individuals during the stop of an automobile by police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of this provision. An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.

Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996). See also: United States v. Moorefield, 111 F.3d 10, 12 (3d Cir.1997)("It is well-established that a traffic stop is lawful under the Fourth Amendment where a police officer observes a violation of the state traffic regulations."). "An investigative detention occurs when a police officer temporarily detains an individual by means of physical force or a show of authority for investigative purposes. Such a detention constitutes a seizure of a person and thus activates the protections of the Fourth Amendment and the requirements of Terry v. Ohio[.]" Commonwealth v. Sierra, 732 A.2d 644, 646 (Pa.1999)(citations omitted).

Upon effectuating a traffic stop, the officer is permitted to ask for the

driver's license and vehicle registration -- nothing more. "[A] traffic stop must be reasonably related in scope to the justification for the stop." United States v. Johnson, supra, 63 F.3d at 247 (citations omitted). As put by the Pennsylvania Superior Court, incident to a traffic stop, a trooper may check the vehicle's registration and the driver's license and then issue a citation or warning. However:

> After producing a valid driver's license and registration, the driver must be allowed to proceed without further delay by the police, unless the police have "reasonable grounds to suspect an illegal transaction in drugs or other serious crime." Commonwealth v. Lopez, 415 Pa.Super. 252, 262, 609 A.2d 177, 182 (1992), allocatur denied, 533 Pa. 598, 617 A.2d 1273 (1992).

Commonwealth v. Pless, 451 Pa.Super. 209, 679 A.2d 232, 233 (1996). "To justify a greater intrusion unrelated to the traffic stop, the totality of the circumstances known to the police officer must establish reasonable suspicion or probable cause to support the intrusion. Clearly, a lawful traffic stop is not 'carte blanche' for an officer to engage in other unjustified action." United States v. Johnson, supra, 63 F.3d at 247 (citations omitted).

"[T]he officer may not, for example, use the stop to question the individual concerning other unrelated potential criminal activity. Berkemer v. McCarty, 468 U.S. 420, 439, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317 (1984)(discussing Fifth Amendment boundaries on questioning during a routine traffic stop). If, however, during questioning related to the routine traffic stop, the officer identifies articulable facts that create reasonable suspicion of additional criminal activity, the officer may continue to detain the driver and investigate the facts giving rise to the additional suspicion. Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968); United States v. Sanchez-Valderuten, 11 F.3d 985, 989 (10th Cir.1993). Again, the officer may ask 'a moderate number of questions . . . to try to obtain information confirming or dispelling the officer's suspicions.' Berkemer v. McCarty, 468 U.S. at 439, 104 S.Ct. at 3150. The same totality of the circumstances test initially used to determine whether an articulable and reasonable suspicion exists applies once more." United States v. Hernandez, 872 F.Supp. 1288, 1293 (Del.1994).

Did Mr. Birt really feel free to leave the scene? Did Trooper Miller

have any basis to continue to question and detain him? Was there any reasonable and articulable suspicion of criminal activity? Did Petitioner ever consent to a search of his car? Was any such consent freely given and thus valid?

Trooper Miller's actions and the overall facts in Mr. Birt's case are virtually identical to Trooper Miller's actions and the facts in Padilla. First, after the trooper told Petitioner he was free to leave, in fact he remained seized for purposes of the Fourth Amendment because of the trooper's subsequent conduct and all the surrounding circumstances. The test for determining whether an encounter is consensual is "whether a reasonable person would feel free 'to disregard the police and go about his business,' or ultimately 'whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter,' 'taking into account all of the circumstances surrounding the encounter.'" Padilla v. Miller, supra, 143 F.Supp. at 468, citing United States v. Kim, 27 F.3d 947, 950-951 (3d Cir.1994), cert. denied, 513 U.S. 1110, 115 S.Ct. 900, 130 L.Ed.2d 784 (1995), quoting Florida v. Bostick, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." United States v. Mendenhall, 446 U.S. 544, 555, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

Notwithstanding that Trooper Miller told Mr. Birt he was free to leave after he signed the warning, under all the circumstances surrounding this incident, a reasonable person would not have felt free to simply get into his car and drive off, refusing the trooper's request to answer more questions or otherwise terminate the encounter. As he did in Padilla, before Mr. Birt could even walk back to his car and get into it, the trooper told him he wanted to ask him additional questions. This was more in the nature of a command than a polite inquiry. Trooper Miller, a canine drug dog handler and not a traffic cop, admitted that he knew he was going to ask Petitioner for consent to search the car even before giving him the warning, N.T. 52, that this was the reason he called another trooper to the scene, N.T. 52, and that the reason he asked him to exit the car in the first instance was precisely to try to develop the probable cause that he lacked: "But your purpose in getting him out of the car was at least in part so you could make further

observations and see if you could develop probable cause to do something. Is that right?" Answer: "Yes." N.T. 35. Contrast with Commonwealth v. Houck, 700 A.2d 1263 (Pa.Super.1997), aff'd. by evenly divided court, 557 Pa. 496, 734 A.2d 1275 (1999)(defendant not seized; told "free to leave" after given written warning and while still in the car; simply had to drive off).

As noted by Chief Judge Vanaskie, "the fact that questioning was preceded by a statement that 'you are free to leave' is not dispositive. The Supreme Court has rejected 'bright line' rules in determining whether an encounter is consensual. See Ohio v. Robertson, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). Instead, the inquiry is fact-specific, with the result turning upon an assessment of 'all the circumstances surrounding the encounter.' Id. In this case, a careful consideration of the totality of the circumstances compels the conclusion that Trooper Miller's questioning of Fayne Padilla did not occur in the context of a consensual encounter." Padilla, supra, 143 F.Supp. 469, n. 4.

Further, Trooper Miller's authoritative request for additional questioning, made before Mr. Birt could even return to his vehicle, was accompanied by a show of force as it was in Padilla in which two other state troopers were on the scene. He was completely alone. Here, Trooper Miller was armed at all times with his certified drug dog, "Hammer," an especially intimidating factor, and another trooper had arrived as backup. Both vehicles had their emergency police lights flashing. N.T. 3-6, 21, 46. Indeed, as the trooper candidly testified, "[c]urrent state case law, there is a case that just came out where even vehicle presence, even police vehicle presence with lights flashing, causes undue intimidation factors in defendants." N.T. 46.

The Third Circuit, although conceding that "at first blush" Padilla provides grounds to find the continued detention by Trooper Miller to be unconstitutional, then went on to hold that because "the facts in Padilla were more egregious than those in this case [i.e., Petitioner's], it was not. So, the Court seems to agree that Petitioner's detention here was egregious but just not egregious enough. Its attempt to distinguish Mr. Birt's detention from Padilla's is far from persuasive, saying the encounter was not as extensive, the trooper did not invade his personal space and did not use an authoritative voice. See Appendix. Of course it fails to mention the presence of another trooper with a drug dog (conveniently) on the scene, the prior encounter with the same trooper in similar circumstances, the fact that both police vehicle's

had their emergency lights flashing, and that Trooper Miller had his drug dog with him while on "routine" patrol as he interrogated the Petitioner.

Coupled with the Petitioner's prior encounter with Trooper Miller just two or so months earlier, in which he demanded "consent" to search by threatening to tow the vehicle, Mr. Birt had no real choice but to remain at the scene and answer the trooper's additional questions. "Under the circumstances, a reasonable person would have felt that compliance with Trooper Miller's request was required. See United States v. Buchanon, 72 F.3d 1217, 1224-25 (6th Cir.1995)(finding that reasonable person confronted by four police officers and police dog would not have felt free to terminate encounter)." Padilla, supra, 143 F.Supp.2d at 469; emphasis added. Petitioner unquestionably had been seized under the Fourth Amendment.

In addition, unlike in United States v. Griggs, 114 F.Supp.2d 334 (M.D.Pa.2000), Mr. Birt here did not execute a State Police consent form and was never told by Trooper Miller that he had a right to refuse to consent or that he could deny consent or stop the search of the vehicle at any time. The Griggs Court found that the fact that the defendants signed a consent form acknowledging that a search could not be conducted without a warrant and that they had a right to refuse the request together with the fact that the trooper explained the form to them and told them that they could deny consent or stop the search at any time were important factors suggesting that consent was voluntary, citing United States v. Bates, 840 F.2d 858, 861 (11th Cir.1988)(defendant who consented to search could not argue that search was unreasonable as beyond scope of probable cause for traffic stop; consent voluntary when defendant advised orally and on form he signed giving consent to search). 114 F.Supp.2d at 343. The record discloses that Petitioner was never presented with the PSP consent form, did not sign one, and Trooper Miller never explained his right to refuse, etc., which is further evidence of the involuntariness of the consent. Griggs, supra.

Indeed, the Third Court found similarly in United States v. Givan, 320 F.3d 452, 60 Fed.R.Evid.Serv. 1138 (3d Cir.2003). It held that the consent to search his vehicle by a defendant was voluntary because, after completing the basis for the traffic stop and asking him a few more questions, the Pennsylvania State Trooper -- before asking him for consent to search -- informed him that his consent had to be voluntary and that he did not have to allow the search. 320 F.3d at 459. Trooper Miller, by substantial contrast, never informed the Petitioner instantly that his consent had to be voluntary or

that he could have refused to give consent to search. Again, this tends to undermine the district court's finding of voluntariness according to this Court's own reasoning.

"Once a police officer has completed the purposes of a traffic stop and does not have a reasonable and articulable suspicion of criminal activity, continuing the detention of the vehicle occupants violates their Fourth Amendment rights. See United States v. Jones, 44 F.3d 860, 872 (10th Cir.1995); United States v. Ramos, 42 F.3d 1160, 1164 (8th Cir.1994), cert. denied, 514 U.S. 1134, 115 S.Ct. 2015, 131 L.Ed.2d 1013 (1995); United States v. Guzman, 864 F.2d 1512, 1519 (10th Cir.1998), overruled on other grounds, United States v. Botero-Ospina, 71 F.3d 783 (10th Cir.1995). Thus, unless Trooper Miller had a reasonable and articulable suspicion to continue the detention of [Mr. Birt], he violated [his] Fourth Amendment rights by not allowing [him] to leave once the purpose of the traffic stop was satisfied. As explained in United States v. Kithcart, 134 F.3d 529, 532 (3d Cir.1998):

> A Terry stop is justified when an officer has a reasonable suspicion that 'criminal activity may be afoot.' The officer's suspicion must be based on articulable facts and not merely the officer's subjective good faith.

Padilla, supra, 143 F.Supp.2d at 469-470.

Trooper Miller had no reasonable or articulable suspicion to continue to detain and interrogate Mr. Birt. The only factors known to him at the time were that the Petitioner could not remember the score of the World Series game the previous night he had attended in New York, N.T. 15; he was driving a car with a Maryland registration and a North Carolina driver's license (both in order), N.T. 10, 26-27; he was "overly nervous for a routine traffic stop," N.T. 9; and an NCIC check confirmed that he had a prior record for drug charges, N.T. 11-12. Trooper Miller was asked: "But there was nothing about any of the paperwork that Mr. Birt gave you that was improper or in any way illegal, improper or -- that's enough, illegal or improper?" His answer: "No." N.T. 27. Period. That was it. Clearly this was insufficient to transform a routine traffic stop into an investigative detention. In fact, Trooper Miller conceded as much when he testified that the reason he had Petitioner exit his vehicle was to try to develop probable cause. N.T. 33, 35.

In the investigative detention approved by the Third Circuit in

United States v. Givan, supra, for example, the defendant had just rented a car in Michigan and he and his passengers all gave conflicting stories about their travel. 320 F.3d at 458-459. Not Mr. Birt here. As in Padilla, supra:

> [T]he only facts known to Trooper Miller at the time he instructed Padilla to return to the rear of the vehicle and answer some questions were that Padilla was from Missouri, had a criminal record and was travelling on an interstate highway. These facts are not sufficient to create an objective basis for extending the scope of the traffic stop to a Terry investigative detention. Our Court of Appeals has observed that "it is not enough that law enforcement officials can articulate reasons why they stopped some one [sic] if those reasons are not probative of behavior in which few innocent people would engage -- the factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied. Karnes v. Skrutski, 62 F.3d 485, 493 (3d Cir.1995). In this case, the mere fact of movement on an interstate highway coupled with the existence of a prior record do not eliminate a substantial portion of innocent travelers. In this regard, Trooper Miller has adduced no evidence that a substantial number of persons with criminal records are engaging in criminal activity when they travel the nation's interstate highways.

Padilla, supra, 143 F.Supp.2d at 470. Here, that Mr. Birt was traveling from New York to Maryland, had out-of-state registration and license (both in order), had a prior criminal record and was nervous failed to eliminate a substantial number of innocent travelers on the interstate highway system.

On the issue of nervousness, see, e.g., Commonwealth v. Reppert, 814 A.2d 1196 (Pa.Super.2002)(en banc)(in unanimous en banc opinion, the Pennsylvania Superior Court held that police officer, following valid traffic stop, illegally detained rear seat passenger in motor vehicle on grounds that his head and shoulder movements were suspicious and he appeared "very, very nervous"); "[W]e find no basis to conclude that excessive nervousness and furtive movements, even considered together, give rise to reasonable suspicion of criminal activity. A police officer's observation of a citizen's nervous demeanor and furtive movements, without more, establishes nothing

more than a 'hunch,' employing speculation about the citizen's motive in the place of fact. Were we to validate such a practice, we would open every occupant of a motor vehicle in this Commonwealth to law enforcement officers' wholly subjective interpretation of inoffensive conduct, and undermine our Supreme Court's time-honored insistence that police officers may stop our citizens only on the basis of objective criteria. This we cannot do. This we will not do.") 814 A.2d at 1206 (citations omitted).

Mr. Birt is the passenger in Reppert. And in fact, Trooper Miller described him as: "He's relaxed -- he's reclined in the seat, however, he's trying to appear that he's not nervous by reclining himself in the seat." N.T. 31, 9. So, trying not to appear nervous is now deemed criminal behavior?

Trooper Miller needed a reasonable suspicion of criminal activity to detain the Petitioner beyond the time necessary to issue him a traffic warning. As the Third Circuit has held: "Clearly, a lawful traffic stop is not 'carte blanche' for an officer to engage in . . . unjustified action." United States v. Johnson, supra, 63 F.3d at 247. That Trooper Miller's "'hunch about [Mr. Birt] proved correct is perhaps a tribute to his policeman's intuition, but it is not sufficient to justify, ex post facto, a seizure that was not objectively reasonable.'" Padilla, supra, 143 F.Supp.2d at 470. As he did in Padilla, Trooper Miller violated the Petitioner's Fourth Amendment rights after the initial traffic stop by continuing to detain and question him after the reasons for the stop had been satisfied.

For all these reasons, any consent Mr. Birt gave to search his vehicle was neither free nor voluntary but rather coerced by Trooper Miller's unlawful and unconstitutional conduct. Accordingly, all evidence obtained should have been suppressed by the district court but was not. The Third Circuit wrongly decided this issue contrary to this Court's search-and-seizure jurisprudence. Certiorari should be granted.

B. THE FOURTH AMENDMENT IS OFFENDED WHEN THE GENERALIZED CONSENT TO SEARCH A VEHICLE IS EXTENDED TO OPEN AND SEARCH A CLOSED OVERNIGHT BAG INSIDE A LOCKED TRUNK FOR WHICH NO CONSENT -- SPECIFIC OR IMPLIED -- WAS GIVEN.

After searching the interior of Mr. Birt's car, Trooper Miller proceeded to open the closed trunk with the interior trunk release. He

removed a small overnight bag from the trunk and put it on the trunk lid. The drug dog was walked around the exterior of the vehicle and alerted to the bag on the trunk lid. The trooper then put the bag on the ground and the dog again alerted to it by biting and scratching at it. He opened the overnight bag and found a plastic bag containing the crack cocaine. N.T. 17-19.

Because any general consent that the Petitioner gave to search his vehicle did not extend to his closed overnight bag inside the closed trunk, Trooper Miller exceeded the scope of the consent and the evidence obtained should have been suppressed. The Third Circuit's decision is contrary to this Court's decision in Florida v. Jimeno, 501 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991), and progeny.

This Court's law on the scope of consent and closed containers has been summarized as follows:

> It is clear that "[w]hen an official search is properly authorized -- whether by consent or by the issuance of a valid warrant -- the scope of the search is limited by the terms of its authorization." Walter v. United States, 447 U.S. 649, 656, 100 S.Ct. 2395, 2401, 65 L.Ed.2d 410 (1980). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 500 U.S. 248, 251, 111 S.Ct. 1801, 1803-04, 114 L.Ed.2d 297 (1991).

United States v. Kim, 27 F.3d 947, 956 (3d Cir.1994). In Kim, the Court found that where a defendant was asked by a DEA agent whether he had any illegal drugs in his luggage and agreed to consent to a search of that luggage, the agent was justified in opening and searching any containers within that luggage. A can was found, opened by the agent, and discovered to contain methamphetamine. Critical to this determination was "the principle underlying the Jimeno ruling that when one gives general permission to search for drugs in a confined area, that permission extends to any items within that area that a reasonable person would believe to contain drugs." Id.; emphasis supplied. The Third Circuit here relied on Kim in finding that Mr. Birt's consent was limitless. See Appendix.

Here, assuming that Mr. Birt's consent to search was valid, which he disputes, the fact remains that this consent was to a generalized search of his Honda automobile and not to a confined area. This distinction is important. Trooper Miller never asked the Petitioner for his permission to open the trunk and search inside it; he never asked the Petitioner for permission to have the drug dog search the overnight bag; he never asked him for permission to open and search the closed overnight bag. The trunk was that "confined area" in Kim and the bag was the can. At no time did Mr. Birt give general permission to search for drugs "in a confined area" as did the defendant in Kim. The scope of the search was exceeded by the trooper and hence it was unconstitutional.

This conclusion is based on Jimeno itself, which the Third Court cited in Kim. This Honorable Court never held that once an individual consents to a general search of his vehicle, the police are entitled to open a trunk and search any closed containers within the trunk and, indeed, hastened to distinguish the facts in Jimeno from those in State v. Wells, 539 So.2d 464 (1989), aff'd on other grounds, 495 U.S. 1, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990), upon which the Florida Supreme Court relied in affirming the suppression order in Jimeno. This is a misreading of Jimeno.

These are the facts in Jimeno, which deserve to be read in detail and closely:

> This case began when a Dade County police officer, Frank Trujilo, overheard respondent, Enio Jimeno, arranging what appeared to be a drug transaction over a public telephone. Believing that [Jimeno] might be involved in illegal drug trafficking, Officer Trujilo followed his car. The officer observed [him] make a right turn at a red light without stopping. He then pulled [him] over to the side of the road in order to issue him a traffic citation. Officer Trujilo told [him] that he had been stopped for committing a traffic infraction. The officer went on to say that he had reason to believe that [he] was carrying narcotics in his car, and asked permission to search the car. He explained that [Jimeno] did not have to consent to a search of the car. [He] stated that he had nothing to hide and gave Trujilo permission to search the automobile. After two passengers stepped out of [his] car, Officer Trujilo went to the passenger side, opened the

door, and saw a folded, brown paper bag on the floorboard. The officer picked up the bag, opened it, and found a kilogram of cocaine inside.

* * *

> The scope of a search is generally defined by its expressed object. United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). In this case, the terms of the search's authorization were simple. [Jimeno] granted Officer Trujilo permission to search his car, and did not place any explicit limitation on the scope of the search. Trujilo had informed [him] that he believed [he] was carrying narcotics, and that he would be looking for narcotics in the car. We think that it was objectively reasonable for the police to conclude that the general consent to search [the] car included consent to search containers within that car which might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of a container. "Contraband goods rarely are strewn across the trunk or floor of a car." Id., at 820, 102 S.Ct., at 2170. The authorization to search in this case, therefore, extended beyond the surfaces of this car's interior to the paper bag lying on the car's floor.

Jimeno, supra, 500 U.S. at 250-251. In other words, after the defendant gave the go ahead to search his vehicle, the officer saw a folded paper bag -- lying in plain view on the car's floor -- and opened it; he did not open a trunk, find a closed piece of luggage and open it.

In reaching its decision, this Court expressly distinguished the facts of Jimeno from those of State v. Wells, supra: "There the Supreme Court of Florida held that consent to search the trunk of a car did not include authorization to pry open a locked briefcase found inside the trunk. It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag." 500 U.S. at 251-252; emphasis supplied. So, even if one consents to a search of the car's trunk, the scope of that consent, according to the highest court in the land, does not extend to the opening of a closed piece of luggage, such as a briefcase. In

this critical respect, this Honorable Court is in full agreement with State v. Wells, supra.

In State v. Wells, supra, the trooper asked for and received permission to open the trunk of a car, and not a generalized search of the vehicle. Unable to open the trunk, the trooper had it towed to a garage and searched the interior, finding two marijuana cigarette butts in an ashtray. Assisted by others, the trunk was opened with a key and the locked suitcase was pried open with a knife; a garbage bag containing a large amount of marijuana was discovered inside. 539 So.2d at 466. The state supreme court held that the consent to search the trunk did not extend to opening the locked suitcase: "[W]e decline to establish a rule that effectively would countenance breaking open a locked or sealed container solely because the police have permission to be in the place where that container is located, as in this instance. This would render the very act of locking or sealing the container meaningless and would utterly ignore a crucial concern underlying fourth amendment jurisprudence: the expectation of privacy reasonably manifested by an individual in his locked luggage, no matter where that luggage is located." 539 So.2d at 467; footnote omitted.

From this Honorable Court's reading of Wells in Jimeno, a clear factual distinction is made between a folded paper bag lying in plain view on the floor of a car and a closed piece of luggage inside the car's locked trunk. This clear factual distinction, totally escaping the Third Circuit and the district court here, which held that general consent to search a vehicle means anything and everything inside, see Appendix, Third Circuit mem. op. at 8-9, and district court mem. op. at 8-9, has profound ramifications on the lawful scope of consent to search. Is Mr. Birt's closed overnight bag, a piece of luggage, more like the folded paper bag lying on the car's floor, Wells, or is it more akin to the closed suitcase, a piece of luggage, inside the car's trunk, Jimeno?

Surely if the Jimeno Court held that it "is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk," 500 U.S. at 251-252, so then it is most unreasonable to believe that Mr. Birt -- who never gave explicit consent to a search of his trunk at all -- agreed to the opening of his closed overnight bag inside the locked trunk merely by consenting to a general search of his vehicle. Under the Fourth Amendment's basic test of reasonableness, Trooper Miller's conduct in coercing consent from the

Petitioner in the first instance and then blatantly exceeding the scope of any consent by removing his closed overnight bag from the trunk and searching it is unreasonable. According to Jimeno, all evidence must be suppressed.

Returning to this same Trooper Miller's misconduct in Padilla, supra, Chief Judge Vanaskie held that under Jimeno, the authorization by the wife to search their car did not extend to closed baggage in the trunk:

> In this case, the exchange between [the wife] and Trooper Miller consisted entirely of Trooper Miller asking [the wife] if she would mind if he looked in the car and her saying that she did not mind. It is undisputed that Trooper Miller did not tell [the wife] the purpose of the search, what he looking for, or that he intended to search the luggage and/or any contents of containers found in the vehicle.
>
> Under these circumstances, a reasonable person would not have understood that [the wife's] consent extended to luggage contained in the trunk.

143 F.Supp. at 471. This is precisely the same factual scenario addressed by this Court in Jimeno as it approvingly distinguished the facts before it from those in State v. Wells, supra, and it is almost exactly the same facts presented here by Mr. Birt.

The bottom line is that the Petitioner's generalized consent to search his car, which consent he disputes as argued above, did not extend to the opening of the locked trunk, the removal of his sealed overnight bag, and its search by the trooper sans warrant supported by probable cause. This, after all, is what the Fourth Amendment requires. As in Padilla, the trooper did not tell Mr. Birt the purpose of the search, what he was looking for, or that he intended to search the trunk or the contents of any luggage or other containers inside the trunk. Under these circumstances, a reasonable person would not have understood that his generalized "consent" to search the car extended to luggage contained in the trunk. Padilla, supra. Trooper Miller exceeded the scope of the consent in violation of Mr. Birt's Fourth Amendment rights and his expectation of privacy in the luggage. And hence all evidence obtained as a result, including any incriminating statements, should have been excluded from trial and, because they were not, a new trial must be granted.

This issue affords Your Honorable Court the opportunity to apply and clarify its ruling in Jimeno, supra.

Conclusion

WHEREFORE, Petitioner, Jamell Birt, based on the foregoing argument, respectfully requests that Your Honorable Court grant a writ of certiorari, reverse the Third Circuit's order, vacate his judgment of conviction and sentence, reverse the District Court's order denying his suppression motion, and order the suppression of all evidence unconstitutionally obtained and the fruits thereof.

RESPECTFULLY SUBMITTED:

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DATED: April 19, 2005.

JAMELL BIRT,

Appellant

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Actions No. 02-cr-00286)
District Judge: Honorable Yvette Kane

Argued December 29, 2004

Before: AMBRO, VAN ANTWERPEN and STAPLETON, Circuit Judges

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the Middle District of Pennsylvania and was argued on December 29, 2004.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered March 1, 2004, be and the same is hereby affirmed.

All of the above in accordance with the opinion of this Court.

ATTEST:

/s_____
Clerk

Dated:January 19, 2005

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-1562

UNITED STATES OF AMERICA

v.

JAMELL BIRT,

Appellant

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Actions No. 02-cr-00286)
District Judge: Honorable Yvette Kane

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Before: AMBRO, VAN ANTWERPEN and STAPLETON, Circuit Judges

(Opinion filed: January 19, 2005)

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OPINION

AMBRO, Circuit Judge

Jamell Birt appeals the District Court's denial of his motion to suppress evidence taken from a bag in the trunk of his car. We affirm.

I. Factual Background and Procedural History

In October 29, 2001, Trooper Gregory Miller of the Pennsylvania State Police stopped Birt for a traffic violation by pulling behind him in his patrol car with his emergency lights flashing. Birt concedes that the initial traffic stop was valid.

Birt showed Trooper Miller a valid North Carolina driver's license and a valid Maryland car registration. This raised some suspicion for Trooper Miller, as he testified that in his experience persons who are illegally transporting guns or drugs often have documents from different states. Trooper Miller observed that Birt appeared "overly nervous for a regular traffic stop," and he thus ran a criminal history check on Birt that revealed an extensive record of drug charges.

Trooper Miller called for backup, and a second officer arrived with his patrol car's emergency lights flashing. Trooper Miller proceeded to issue Birt a traffic warning. After telling Birth that he was free to go, Trooper Miller inquired whether he could ask Birt more questions. Birt gave no oral response but extended his hands palms up at chest height. Trooper Miller then asked Birt a series of questions about his journey and whether Birt had anything illegal in the car such as guns or drugs. Birt responded that he had nothing to hide.

At this point, Trooper Miller asked Birt for permission to search his

vehicle. Trooper Miller, in testimony credited by the District Court, said that Birt told him it would be "okay" for him to search the car. Birt, however, testified that he did not consent to a search. Trooper Miller also informed Birt that he was going to have Hammer, his drug dog who had been present in Trooper Miller's patrol car throughout the encounter, "run on the car." Birt did not respond. The District Court also credited Trooper Miller's testimony that Birt told him he could use the car's interior trunk release mechanism to access the trunk.

Trooper Miller removed an overnight bag from Birt's trunk, and Hammer twice alerted to the bag. When Trooper Miller opened the bag, he found crack cocaine inside. He then arrested Birt.

In March 2003, the District Court denied Birt's motion to suppress the crack cocaine found in the overnight bag, determining that Birt's encounter with Trooper Miller after the issuance of the traffic warning was consensual and that the search of the overnight bag did not exceed the scope of Birt's consent to the search of his car. Birt subsequently entered a conditional guilty plea to charges of possession with intent to distribute an unspecified quantity of crack cocaine. The sole issue on which he reserved his right to appeal was the denial of his suppression motion, and that issue is now before us.[2]

II. Discussion

We review the District Court's "denial of the motion to suppress for clear error as to the underlying facts, but exercise[] plenary review as to its legality in light of the [C]ourt's properly found facts." United States v Givan, 320 F.3d 452, 458 (3d Cir. 2003). Birt advances two arguments in favor of reversal: (1) the District Court erred in finding that his continued encounter with Trooper Miller was consensual; and (2) even if Birt did give a valid consent to the search of his car, the search of the closed overnight bag in the trunk exceeded the scope of that consent. We address each argument in turn.

A.The District Court's Determination that Trooper Miller's Further Questioning of Birt was Consensual

> The voluntariness of an individual's consent is a question of fact to be determined from

the totality of the circumstances. Id. at 459 "[T]he critical factors comprising a totality of the circumstances inquiry [are] the setting in which the consent

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We have jurisdiction pursuant to 28 U.S.C. § 1291.

was obtained, the parties' verbal and non-verbal actions, and the age, intelligence, and educational background of the consenting party." Id.; see also United States v. Kim, 27 F.3d 947, 951 (3d Cir. 1994) (in determining whether an encounter is consensual, rather than a seizure, "the test is whether a reasonable person would feel free to disregard the police and go about his business or whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter, taking into account all of the circumstances surrounding the encounter." (internal quotation and citation omitted)).

The District Court's finding that Trooper Miller's extension of the traffic stop and further questioning of Birt was consensual is amply supported by the record. The concededly valid traffic stop took place on a busy highway. Birt himself testified that Trooper Miller told him he was free to leave after the traffic warning was issued. Birt also opened his arms in a "gesture of invitation" after Trooper Miller requested further questioning and proceeded to respond to all questions asked. Birt is an adult, and, as the District Court found, there is no indication that he is particularly vulnerable to coercion. Although another officer and a drug dog were present and the lights of both patrol cars were flashing during the encounter, a reasonable person would not have been so intimidated by these circumstances that he would not have felt free to leave or otherwise terminate the encounter.[3] The second officer did not interact with Birt at all, and the drug dog remained in Trooper Miller's car until after Birt consented t the search of his car.

Having reviewed all the testimony from the suppression hearing, we do not believe that the District Court's finding that the continued encounter

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[3]Birt testified that he felt compelled to answer Trooper Miller's questions because, about two months prior to the stop at issue here, he was a passenger in a car stopped by Trooper Miller. According to Birt, Trooper Miller threatened that he would have that car towed if the driver did not consent to a search of the vehicle. Trooper Miller testified that he did not remember that stop. The District Judge concluded that she was "not convinced" that Trooper Miller was the officer involved in the prior incident. While typically a specific recitation of the facts trumps non-recollection, in the context of the facts here we do not conclude the District Court clearly erred. See Newark Branch, NAACP v. City of Bayonne, 134 F.3d 113, 120 (3d Cir. 1998) ("[Clearly erroneous] review is more deferential with respect to determinations about the credibility of witnesses."). Moreover, there is no evidence that Trooper Miller made any threats during the incident in this case to coerce Birt's cooperation.

between Trooper Miller and Birt was consensual is clearly erroneous.[4] It follows that Birt's consent to the search, which was the product of this questioning, was also valid.[5] We must now determine whether the search of the overnight bag in Birt's trunk exceeded the scope of that consent

B. The District Court's Determination that the Search of the Overnight Bag did not Exceed the Scope of Birt's Consent to the Search of his Car.

A warrantless search is per se unreasonable under the Fourth

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[4]At first blush, Birt's reliance on Padilla v. Miller, 143 F.Supp. 2d 453 (M.D. Pa. 1999), appears to provide fertile ground for a possible reversal of the District Court's findings that Birt's continued encounter with Trooper Miller was consensual. In Padilla, Trooper Miller was found liable under 42 U.S.C. § 1983 for violating Padilla's Fourth Amendment rights by, inter alia, extending the scope of a traffic stop without a reasonable, articulable suspicion of criminal activity. Id. at 469-70 (rejecting Trooper Miller's argument that he converted the extension of the traffic stop into a consensual encounter by telling Padilla that he was free to leave before asking him questions beyond the scope of the initial stop). Upon closer inspection, however, the facts in Padilla were more egregious than those in this case.

The District Court found that the defendant in Padilla would not have felt free to leave or otherwise terminate his encounter with Trooper Miller because, on a cold January day, Trooper Miller: (1) ordered Padilla, who wore only a shirt, to get out of his car at least twice; (2) after issuing a traffic warning, told Padilla "in an authoritative tone of voice" that he wanted to ask more questions; and (3) had two other officers present with him at the scene. Id. at 469. By contrast, Birt's encounter with Trooper Miller was not as extensive as was Padilla's, Trooper Miller used an authoritative tone in requesting that Birt answer more questions.

By affirming the District Court in this case, we do not in any way lessen the effect of Padilla or condone a repetition of the unconstitutional conduct present in that case. We merely hold that the District Court did no err in finding that the Fourth Amendment line was not crossed here.

[5]We need not reach Birt's argument that Trooper Miller did not have a reasonable, articulable suspicion of criminal activity that justified the further questioning because consensual encounters do not implicate the Fourth Amendment. See Kim, 27 F.3d at 950.

Amendment. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). "It is well settled, however, that a search conducted pursuant to consent is one of the specifically established exceptions to the search warrant requirement" Givan, 320 F.3d at 459

When a warrantless search is authorized by voluntary consent, the extent of that search is limited to the terms of the consent. Kim, 27 F.3d at 956. An objective reasonableness standard is used to measure the scope of a suspect's consent. Florida v. Jimeno, 500 U.S. 248, 251 (1991). We must therefore ask: "[W}hat would the typical reasonable person have understood by the exchange between the officer and the suspect?" Id.

In Jimeno, the Supreme Court held that, when an officer had told a suspect that he believed the suspect was carrying narcotics, it was reasonable for the officer to understand that searching a folded bag found on the floor of the car was within the scope of the suspect's general consent because "a reasonable person may be expected to know that narcotics are generally carried in some for of a container." Jimeno, 500 U.S. at 251. The Court pointed out, however, that the search of a locked briefcase in a suspect's trunk, even when consent to search the trunk had been given, would likely be unreasonable. Id. at 251-52 (discussing the facts of State v. Wells, 539 So.2d 464 (Fla. 1989), aff'd on other grounds, 495 U.S. 1 (1990)). Birt argues that the search of the closed overnight bag in his trunk is akin to the search of the locked briefcase described as unreasonable in Jimeno.

This argument is unpersuasive in light of our decision in Kim. There we held that it was reasonable for officers to understand that train passengers' general consent to the search of their luggage for narcotics authorized them to open closed cans within that luggage. Kim, 27 F.3d at 956-57. We also stated that the closed cans were dissimilar to the locked briefcase discussed in Jimeno, relying on the D.C. Circuit Court's reasoning in United States v. Springs, 936 F.2d 1330 (1991). Springs upheld the search of a container of baby powder in a woman's tote bag when the woman had consented to the search of her luggage and the officer had told her he was looking for narcotics, distinguishing the closed container from the locked briefcase scenario because "the opening of the baby powder container did not depend upon possession of a key, knowledge of a combination, or anything other than merely removing its lid. Neither did the fact of its opening render it useless." Id. at 1334-35.

Following the reasoning of Kim and Springs, Trooper Miller's search of Birt's overnight bag was reasonable. Birt was asked if he had illegal drugs, and a reasonable person would thus have understood his general consent to the search as authorizing the search of any containers in which narcotics might be found, including the overnight bag. No special

knowledge was required to open the overnight bag, and there is no evidence that the opening rendered the bag useless. As Birt did not place any limitations on the scope of his consent, Trooper Miller's search of the overnight bag was therefore within the scope of Birt's consent and did not violate the Fourth Amendment.[6]

III. Conclusion

We affirm the decision of the District Court.

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[6]The First Circuit has upheld a similar search, although it did so without distinguishing the locked briefcase scenario set forth in Jimeno. United States v. Zapata, 18 F.3d 971, 977-78 (1st Cir. 1994) ("Because the duffel bags were lying in the trunk, appellant's general consent to a search of the automobile constituted consent to a search of the duffel bags.").

IN THE MIDDLE DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 1:02-CR-0286**
	:	
	:	
v.	:	
	:	
	:	
JAMELL BIRT	:	**(Judge Kane)**

MEMORANDUM AND ORDER

This matter is before the Court on motion of Defendant to suppress the approximately 185.6 grams of crack cocaine seized from his automobile on October 29, 2001. On March 19, 2003, the Court heard the testimony of Defendant and the Pennsylvania State Police Trooper who seized the drugs, and the parties have briefed the issues in dispute. For the reasons that follow Defendant's motion will be denied.

I. Findings of Fact

The pertinent facts are as follows. At 5:15 p.m. on October 29, 2001 Trooper Gregory Miller of the Pennsylvania State Police Bureau of Emergency and Special Operations was on routine patrol in the vicinity of milepost 88 of Interstate 81 in Lebanon County Pennsylvania. Trooper Miller was accompanied by "Hammer," a certified drug sniffing Labrador Retriever. While traveling South on that highway, Trooper Miller observed that the 1992 Honda Accord in front of him exceeded the speed limit, and

that the driver changed lanes abruptly without signaling. Using his overhead lights, Trooper Miller signaled for the driver to leave the highway, and the driver complied. The trooper then approached the car from the passenger side and requested the driver's license registration. The driver, Defendant Jamell Birt, produced a valid North Carolina operator's license and valid Maryland registration papers for the vehicle.

The fact that the documents produced were from states of different origin raised some suspicion in the mind of Trooper Miller. Moreover, he observed that the defendant appeared unusually nervous even though he reclined in his seat as if he were relaxed. These observations caused the trooper to return to his car to request a National Crime Information Center ("NCIC") check. NCIC disclosed that Defendant Birt had a record of drug related crimes. As the trooper was gathering this information he observed the Defendant, still reclined in his seat, nervously checking the rear view mirrors of his vehicle. Trooper Miller determined then to request Defendant's permission to search the car, and he called for backup.

Trooper Miller thereafter returned to the Defendant's car, and asked Defendant to join him at the rear of the vehicle to discuss the warning citation he had determined to issue for the traffic infractions. During that discussion, another police cruiser arrived at the scene, overhead lights flashing, and parked nearby. The driver of that police vehicle left his car and stood nearby, but did not interact with Defendant or Trooper Miller.

Standing near the trunk of the vehicle, Miller explained the citation and procured Defendant's signature. The Trooper advised Defendant that the warning wsa not the same as a ticket, that Defendant would not have to pay a fine, and that no points would be assessed to his driver's license. The Trooper then told Defendant that he was free to leave. Trooper Miller returned to his vehicle, and the Defendant did the same. As they did, Miller called out to Defendant and asked him whether he minded being asked a few questions. Defendant gave no verbal response but extended his hands palms up at chest height. The officer then asked Defendant where he had come from and where he was going. Defendant explained that he had been in New York City, attending a Yankees game with his girlfriend. Aware that the game was part of the world series, Miller asked Defendant who won. Defendant did not know the victor or the score of the game. He offered no explanation for his inability to answer questions abut the game. In response to Miller's question about his destination, he stated that he was going to

Hagerstown, Maryland and that the reason for the discrepancy in his documents was that he had just moved from North Carolina to Hagerstown.

The Trooper then questioned whether the Defendant was carrying anything illegal such as drugs or guns. When the defendant answered "no" and said that he had "nothing to hid," the Trooper asked whether he could search the car. When Defendant answered "okay," Miller said, "I am going to run the dog on the car." Defendant did not reply. Trooper Miller then inspected the interior of Defendant's car and asked Defendant for the key to the trunk. Defendant did not have a trunk key, but agreed that the officer could use the trunk release mechanism inside the car. Trooper Miller removed an overnight bag from the trunk and set it on the trunk lid to hold the trunk lid in place. He then walked the perimeter of the car with Hammer. Hammer alerted when he came into contact with the overnight bag. After the dog alerted, the officer removed the bag from the trunk, placed it on the road and allowed Hammer to continue the search of the trunk. After Hammer finished searching the trunk, the Trooper re-directed the dog to the bag. Once directed to the bag, Hammer alerted. The officer then opened the bag and found the crack cocaine that is the subject of Defendant's motion to suppress.

II. Discussion

Defendant does not dispute that his initial stop was legally justified. However, he alleges that after the issuance of the warning citation, all of Trooper Miller's actions were without legal authority. That is, Defendant maintains that the further detention, questioning, and request to search were in violation of the Fourth Amendment. Defendant denies that he consented to questioning and denies that he authorized a search of his vehicle. Moreover, argues Defendant, should the court find that he consented to a vehicle search, the officer exceeded the scope of the consent search by using the drug sniffing dog and by opening the overnight bag. The Government argues that Defendant consented to the questioning and the search, rendering both constitutional. The Government has the burden of proving, by a preponderance of the evidence, that the Defendant's consent to a warrantless search was given freely and voluntarily. Florida v. Royer, 460 U.S. 491, 497 (1983).

A. Initial Stop

Defendant concedes that initial traffic stop was valid.

B. Questioning after Issuance of the Warning

Absent reasonable suspicion of criminal activity unrelated to the initial purpose of a traffic stop, detention must end and the detainee must be allowed to leave once the officers have completed the activities related to the stop. United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975)("stop and inquiry must be 'reasonably related in scope to the justification for their initiation'")(quoting Terry v. Ohio, 392 U.S. 1, 29 (1968)); Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion)("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"); United States v. John, 234 F.3d 234, 241 (5th Cir.2000). During a traffic stop, the officer must limit his questioning to matters directly related to the traffic stop. Berkemer v. McCarty, 468 U.S. 420, 439 (1984). Defendant argues that because Trooper Miller's suspicions about him did not reach the level of reasonable suspicion, his continued detention and questioning was unlawful. This court need not reach this question, as the Court finds that Defendant was not detained for questioning, but rather that he engaged in a consensual exchange with Trooper Miller.

Even where police do not have a reasonable suspicion that would justify extending a traffic stop for detention and further questioning, they are free to request consent to question or search. Unites States v. Drayton, 122 S.Ct. 2105, 2110 (2002)("Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage – provided they do not induce cooperation by coercive means.")(citing Florida v. Bostick, 501 U.S. 429, 434-435 (1991)). A consensual encounter with law enforcement is not a seizure under the Fourth Amendment. Drayton, 122 S.Ct. at 2110 ("If a reasonable person would feel free to terminate the encounter, then he or she has not been seized."). To determine whether an encounter is consensual, this Court must decide "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter,' 'taking into account all of the circumstances surrounding the encounter.'" United States v. Kim, 27 F.2d 947, 950 (3d Cir.1994)(quoting Florida v. Bostick, 501 U.S. 429, 434-36 (1991)).

As Defendant himself testified, he was advised that he was free to leave after Trooper Miller explained the warning citation to him. Indeed,

Birt was returning to his car to do just that when Trooper Miller called out to him seeking permission to ask questions. Birt gave no verbal response, but made a gesture of invitation by opening his arms and hands.[1] He then answered all of the questions put to him, and did not indicate his refusal to converse with the officer by remaining silent or stating that he did not wish to talk with the Trooper. Nevertheless, he argues that he did not freely consent to questioning. This argument is unpersuasive.

Defendant testified that he felt obligated to answer the officer's questions because of events that occurred three months earlier. Defendant testified that three months before the traffic stop at issue here, he traveled the same highway as a passenger in a vehicle stopped for traffic infractions. Because he observed the officer, whom he believed to be Trooper Miller, threaten to tow the vehicle if the driver did not consent to answer questions and permit a search, he claims that he believed that he was required to cooperate when he was stopped. Even if Defendant's consent was predicated on the mistaken perception that the Trooper could have impounded his vehicle if Defendant refused to consent, it is no less voluntary in this context. At the stop at issue in this case, the Trooper did not indicate that Defendant's vehicle would be impounded if he refused to consent, the Trooper merely requested permission to ask Defendant additional questions. Although there may be cases in which a defendant's consent is vitiated because the arresting officer mislead him regarding his rights, the record does not support such a finding here. The Court is not convinced that Trooper Miller was in fact the officer in the prior incident that Defendant references or that the trooper involved in that prior incident misstated the law as it applied to that case.

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[1]Although the issue is not dispositive in this case, the Court notes that nonverbal responses have been acknowledged as a valid basis for the finding of consent. See e.g. United States v. Drayton, 122 S.Ct. 2105 (2002)(a suspect's lifting his arms in response to an officer's request to search his person constituted consent.); United States v. Wilson, 895 F.2d 168, 170 (4th Cir.1990)(defendant consented to a search of his person by shrugging his shoulders and extending his arms in response to an agent's request to search the defendant); United States v. Griffin, 530 F.2d 739, 741 (7th Cir.1976)(defendant's stepping back into an apartment and leaving door partially open in response to officers's request to enter constituted consent).

Thus, any misunderstanding Defendant may have had about his obligation to submit to a search is not attributable to Trooper Miller and does not bear on the voluntariness of Defendant's consent. In short, the Defendant's mistaken perception of the situation does not amount to coercion by the Trooper.

Moreover, there is no credible evidence to support a finding that Defendant's will was overborne by the Trooper. Defendant was stopped in daylight hours on a busy public highway, issued a warning in lieu of a traffic citation, and then told that he was free to leave. He was not handcuffed or restrained in any way, and there was nothing in the officer's gestures manner or tone that were unusually intimidating. It is clear that the manner and timing of Trooper Miller's approach of Defendant was orchestrated to garner Defendant's cooperation. However, the record does not support a finding that this officer crossed the fine line between skilled investigation and illegal police tactics when approaching Defendant for questioning. Although his approach was calculated to elicit a positive response, it was not coercive or unlawful. Miller asked permission to inquire of Defendant, and Defendant cooperated. These facts are similar to those noted in Drayton in that "[t]here was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice." 122 S.Ct. at 2112. No reasonable person in these circumstances would have been so intimidated by this police encounter that he believed that he was required to stay and answer questions. Moreover, having observed Defendant, this Court finds nothing in his manner to suggest that he was especially vulnerable to coercion. The evidence does not support a finding that Defendant's will was overcome by Trooper Miller. Thus, Defendant's consent to questioning was valid and Trooper Miller's questioning of Defendant was not in violation of the Fourth Amendment.

C. The Search

Defendant next argues that the search of his vehicle violates the Fourth Amendment to the United States Constitution. Defendant correctly points out that warrantless searches are presumptively invalid, and can only be sustained on a finding of exigent circumstances or consent. See e.g., U.S. v. Karo, 468 U.S. 705, 716 (1984). Here, the Government argues that Defendant consented to a search of his vehicle. Defendant's testimony regarding consent to search directly conflicts with that of Trooper Miller. Trooper Miller testified that Defendant answered "okay" when asked for

permission to search. Although Defendant denies the Trooper's assertion, this court credits the testimony of Trooper Miller. For the reasons cited above, the evidence does not support a finding that Trooper Miller coerced the Defendant's consent to search.

Defendant next maintains that should this Court find that he consented to the search of his vehicle, Trooper Miller exceeded the scope of any authorized search in two respects. First, Defendant argues that by removing and then opening the overnight bag that was contained in the automobile's trunk, the Trooper exceeded the scope of the search. Secondly Defendant argues that the use of the drug sniffing dog on the luggage exceeded the scope of any consent to search the vehicle. The Government argues that authorization to search a vehicle for guns or drugs is a grant of authority to search any container or bag within that vehicle which could contain such contraband. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness. — what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 500 U.S. 248, 251 (1991); U.S. v. Kim, 27 F.3d 947, 956 (3d Cir.1994). The test is whether a reasonable person, under all the circumstances, would believe that he or she was authorizing a search into the closed containers within the vehicle. Here, where the officer specifically asked the Defendant whether he was carrying illegal drugs or guns in his car, and then requested permission to search the vehicle, it is reasonable to expect that the scope of the search would include areas wherein a gun or drugs might be secreted. Accordingly, under Jimeno, it was objectively reasonable for Trooper Miller to conclude that Defendant's general consent to search the vehicle included consent to search closed containers within car which might bear drugs, including the overnight bag. As Defendant's consent provided Trooper Miller with all the legal justification required to search the overnight bag, this Court need not address the issue of whether the use of a drug sniffing dog exceeds the scope of a consensual search. Moreover, the outstanding arguments concerning the reliability of the drug sniffing dog are rendered moot. Defendant's motion to suppress will be denied.

III. ORDER

Accordingly, **IT IS ORDERED THAT** Defendant's motion to suppress (Doc. No. 15) is **DENIED. IT IS FURTHER ORDERED THAT** the hearing on this matter, held March 19, 2003, is **CLOSED.**

/s/ Yvette Kane

Yvette Kane
United States District Judge

Dated: March 26, 2003.